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March 17, 2000

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VIA US MAIL AND FACSIMILE

David K. Clay, Esq.
Senior Attorney
United States Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street
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Re: Collierville Superfund Site

Dear Mr. Clay:

This letter responds to EPA's request for a response concerning the proposed administrative order on consent (AOC). It is Carrier's hope to negotiate mutually satisfactory terms of such an order. Carrier appreciates the additional time you granted as a professional courtesy, as well as the informal discussions between Carrier's consultant and the Remedial Project Manager. By separate letter, Carrier will respond to EPA's request for past oversight costs, in addition to those Carrier has already paid.

Carrier understands that EPA has used a form with which it is comfortable as the starting point in these discussions. As always, it is helpful to have such a template as a starting point. Much of the language of the proposed AOC, however, is ill-suited to this site, where construction has been completed for a number of years.

As we had discussed in the past, Carrier is far more likely to agree to an Administrative Order on Consent covering future costs if there is an annual cap on such costs. This letter contains such a proposal. Obviously, no responsible publicly traded company will agree to give a blank check for future costs. As presently drafted, the AOC provides EPA far more relief than it could hope to obtain if it were to sue Carrier and obtain a declaratory judgment, since it relieves EPA of showing that the costs were necessary, comply with the National Contingency Plan, and are sufficiently documented to convince a court to order payment.

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The terms of the proposed order also do not recognize that EPA's later recovery under a declaratory judgment under section 107 of CERCLA is conditioned upon a showing that the costs are necessary and not inconsistent with the National Contingency Plan, and that documentation greater than an EPA bill is needed to support recovery under such collection. Carrier proposes to modify the proposed order accordingly.

Carrier's detailed questions and comments about the proposed AOC are as follows. I have keyed this to the page and paragraph numbers of the proposed AOC.

Page one, ¶ 3. Add the following language:

> Carrier responded to the UAO by letter in February, 1993, noting its position that a number of the provisions of the UAO exceeded EPA's authority.

Carrier does not believe there is any need to incorporate the UAO into this agreement. Insistence on that incorporation will reopen a number of disagreements about EPA's authority to include a number of the terms contained in this UAO. For example, the UAO included a provision that Carrier must pay EPA's response costs, a provision with which Carrier took issue, since section 106 does not allow EPA to order a party to pay it money.

¶ 4. Strike out "Settling Party is financing and conducting the RD/RA" and replace with:

> Settling Party has financed and conducted the RD/RA work, completed construction of the treatment system in 199x, and is now conducting Operation and Maintenance (O&M) of the treatment systems. The construction of the treatment systems was completed to EPA's satisfaction, and to date they have been operated in a satisfactory manner.

¶ 5. Strike out "In performing response actions at the Site, including oversight of the RD/RA, EPA incurs response costs at or in connection with the Site," and replace with:

> In performing further response actions at the Site, including oversight of ongoing O&M of the treatment systems, EPA contends that it will incur response costs at or in connection with the Site. This Order addresses response costs incurred from FY2000 to FY2015.

As noted, the past response costs are the subject of a separate discussion. We should be clear that the order looks forward from its effective date, and not backward. Thus, this Order addresses response costs from FY2000 until the end of FY2015. As explained in its letter

addressing past costs, Carrier believes it has already paid all of EPA's response costs incurred for the period after issuance of the UAO, with the exception of one disputed invoice.

¶ 6. Reword to read as follows:

> Settling Party has paid EPA's demands, dated 1990, 1991, and 1992, for oversight costs under the 1989 Administrative Order on Consent, and has paid all but one disputed item of the oversight cost demand dated July 28, 1998. These payments totaled $387,394.97. The demand for oversight costs dated September 1999 seeks an additional $401,885.21 for the period going back to 1980 and continuing to August 31, 1999. The latest demand for response costs is under discussion between EPA and the Settling Party. These cost demands are not addressed by this AOC.

Page 2, ¶ 8. Add the following language at the end: "to the extent such costs are necessary and incurred in a manner not inconsistent with the National Contingency Plan."

Page 2, ¶ 9. The Agreement is binding on EPA, but not the United States. By contrast, EPA claims to be entitled to reimbursement for costs incurred by the United States. See paragraph 10.h. If a declaratory judgment action were brought against Carrier, the result would be binding on the United States, not just EPA. This language should be changed accordingly.

Pages 2-3, ¶ 10.h. "Future Response Costs" definition. The definitional language includes a sentence on interim response costs. Are there any such costs? The language also seems to indicate that past costs that have not yet been paid could also be billed under the agreement. Given Carrier's experience with past oversight costs, where costs incurred in 1986 were not billed until 1999, Carrier does not find such language attractive. This Agreement should be limited to costs incurred for the period from FY2000 until FY2015.

Page 3, ¶ 11. Reword the first sentence with the insertion of the italicized language:

> Settling Party shall reimburse the EPA Hazardous Substance Superfund for all ***necessary*** Future Response Costs ***not inconsistent with the National Contingency Plan.***

The proposed change recognizes that the statutory standard for recovery is that the costs be necessary and consistent with the NCP.

Reword the second sentence with the insertion of the italicized language:

> During each fiscal year, EPA will submit to the Settling Party an accounting of all response and oversight costs incurred by the U.S. Government with ***respect to the Collierville Site,*** the UAO, and this Agreement ***in the prior fiscal year, together with supporting documentation to show that they were incurred in connection with the Collierville Site and for what purpose.***

The inclusion of the reference to the Collierville Site is to assure that there is not some other category of costs not covered by the agreement for which the government later tries to bill Carrier. The reference to the prior fiscal year is to assure that we obtain a prompt and full accounting. The reference to the supporting documentation recognizes that the accounting does not provide enough information for any meaningful review to take place.

Carrier's experience with EPA SPUR reports and similar billing documents indicates that these are useless in determining whether costs were properly incurred. While we understand that EPA prefers such language, Region 4 has agreed in the Rock Hill Agreement for Recovery of Future Response Costs to provide backup information. Given Carrier's experience with EPA's efforts to bill 1986 costs in 1999 at this site, it will always demand backup documentation.

Reword the third and fourth sentences with the insertion of the italicized language.

> The Settling Party will, within ***45*** calendar days of receipt of that ***documentation,*** remit a check for the amount of ***the undisputed*** costs made payable to the "Hazardous Substance Superfund." Interest shall begin to accrue on the ***46th day*** after receipt of the ***documentation.***

The language provides additional time for a meaningful review of the documentation, and makes clear that the interest begins to run if the payment is late.

P. 3, ¶ 12. Delete the last sentence, or reword the last sentence with the insertion of the italicized language:

> Failure to submit an accounting ***and supporting documentation*** in one fiscal year does not prevent EPA from submitting an accounting ***and supporting*** documentation in a subsequent fiscal year, ***but in no event shall any costs incurred before Fiscal 2000 ever be included in any such subsequent accounting and documentation, nor shall any costs incurred more than six years prior to the date of the accounting be included in any such accounting and supporting documentation.***

This AOC is not, in Carrier's view, to be the vehicle for coming back repeatedly for costs incurred prior to this fiscal year, nor is it reasonable for the government to fail to bill it in a timely way. In 1998, Carrier paid all the costs demanded of it for the period beginning with the issuance of the UAO, except for costs for a contractor that EPA retained in apparent violation of conflict of interest requirements. There are very few additional costs incurred after September 1993 identified by EPA in its latest cost claim, and those will be separately addressed by Carrier in connection with the past cost claims.

Six years from accrual of the cost – i.e. when the work was done – should be ample time to put forward all the costs the government has. Indeed, no business would ever be allowed to go back more than a few months in a commercial setting.

P. 4, ¶ 13. Reword the first sentence with the insertion of the italicized language:

> Settling Party may contest payment of Future Response Costs if Settling Party determines that EPA has made an accounting error, has included costs outside the scope of this Agreement, ***has included costs which are inconsistent with the National Contingency Plan, or were unnecessary, or if the documentation submitted with the accounting does not support the claimed costs.***

Reword the second sentence with the insertion of the italicized language

> If Settling Party believes that it has a valid basis ***to contest payment of Future Response Costs*** pursuant to this Agreement, ***the National Contingency Plan, or if the documentation does not show that the claimed cost was necessary and incurred for the Collierville Site and for what purpose,*** then Settling Party shall notify EPA's Project Coordinator within 45 calendar days after receipt of the ***supporting documentation.***

P. 4, ¶ 14. Given that total future response costs are now projected by EPA to be less than $20,000 a year, the escrow requirement makes little sense, particularly from a Fortune 50 Company like United Technologies. We suggest that the escrow requirement either be deleted. The cost of establishing such an account is $1500 to $2500 a year, which serves no useful purpose and would not be required in a judicial proceeding.

Add a new paragraph 15, as follows:

15. Notwithstanding any other provision of this Agreement, the total Future Response Costs which can be billed for any Fiscal Year governed by this Agreement shall not exceed twice the projected response costs for the Fiscal Year in question as shown by the attached schedule, Appendix 1 to this Agreement. This provision shall not apply to documented Future Response Costs specifically arising from (1) overseeing additional work beyond that ordered under the 1993 UAO and the 1992 ROD, (2) conducting onsite work or overseeing onsite work in response to an emergency at the Site, (3) enforcement costs incurred by EPA or the United States in response to violations of the 1993 UAO or this Agreement.

As we have discussed, conditional limitations on oversight costs have been agreed to by the Justice Department and EPA in the past. For example, in *United States v. Davis*, Civil Action No 90-484 (D.R.I.), the United States agreed to limit oversight costs for a LTTD cleanup of contaminated soils to $440,000, unless certain onsite time periods were exceeded for specified efforts. A copy of that language, which was part of a Consent Decree approved by the District Court in *United States v. Davis*, 11 F.Supp.2d 183 (D.R.I. 1999), is attached.

We have used EPA's projected response costs, and proposed to double them, in order to avoid disputes over small differences between EPA's projections and actual amounts billed. Given the condition of this site – where O&M is proceeding smoothly and no further work remains to be done under the ROD – there should be little need for heavy EPA expenditures unless there is an emergency at the Site or unless some further work is ordered for some reason. Absent an emergency at the Site, there seems no reason why EPA cannot agree to a limitation that its oversight costs should not exceed the costs incurred by Carrier to operate and maintain the treatment systems in any year.

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The proposed schedule is based on that provided by Beth Brown Walden to Craig Wise:

Fiscal Year	EPA Estimate (without discounting)	x 2 =	Scheduled amount
2000	$14,670		$29,340
2001	$ 5,300		$10,600
2002	$ 5,450		$10,900
2003	$ 5,500		$11,000
2004	$ 5,650		$11,300
2005	$11,638		$23,276
2006	$ 5,850		$11,700
2007	$ 5,900		$11,800
2008	$ 6,050		$12,100
2009	$ 6,100		$12,200
2010	$13,303		$26,606
2011	$ 6,300		$12,600
2012	$ 6,450		$12,900
2013	$ 6,500		$13,000
2014	$ 6,650		$13,300
2015	$15,977		$31,954

As we have discussed, EPA agreements to dollar limitations on future oversight costs are critical to Carrier's acceptance of any Agreement governing that issue. It is not Carrier's desire to quibble over small differences between actual expenditures and EPA's estimates, which is why we have proposed to double EPA's estimate and to use that as a cap. We also understand that in an emergency, or if there is a violation, or if additional work is ordered for good environmental reasons, then the cap should not control those additional expenditures.

Given EPA's effort now to recover large amounts of expenditures from 1993 and before, going back to 1986, after Carrier had fully paid the invoices rendered to it under the 1989 AOC, Carrier has little faith in EPA's cost accounting, particularly since the documentation provided in support tells nothing of what the employees and contractors actually did in connection with the Site, over a decade ago in some cases. Without a cap, it is unlikely I could persuade Carrier to agree to sign any agreement covering future costs, even if it were to recommend that it do so.

Page 4, Old ¶ 15. Delete references to stipulated penalties. This is a collection agreement where the expected sums are in the range of $10,000 to $20,000 a year. There is no basis for stipulated penalties of $1,000 per day for late payments of such small sums. Carrier would be agreeable to increasing the interest rate for payments more than 60 days late, so that the rate would be the superfund rate plus 10% per annum.

As repeatedly pointed out to EPA in the course of negotiating the 1989 AOC, and again in the fall of 1993, Carrier sought to remedy this Site under the Safe Drinking Water Act, and to follow a much faster time schedule in doing so than EPA did. EPA adamantly refused, and added several years to the process by insisting on the use of CERCLA for much the same remedy as already had been suggested by Carrier. EPA went on later to tout its use of the SDWA administrative order procedures at other sites as a means to expedite cleanups, and recently ordered the military to do an extensive groundwater cleanup under such authority in Region I. Carrier was simply prematurely correct.

Under the circumstances, where EPA delayed the substantive cleanup for several years as a result of its rigid insistence on CERCLA procedures rather than prompt environmental cleanup, Carrier believes that the proposed stipulated penalties for potential late payments of relatively small sums are completely inappropriate. Certainly in a judicial collection action, EPA would not be entitled to such penalties.

P. 5, ¶ 18. Add the following at the end of the second sentence:

> And may be contested by the Settling Party in the U.S. District Court for the Western District of Tennessee."

This merely clarifies that Carrier has the right to judicial review of an EPA decision which aggrieves it.

P. 5, ¶¶ 20, 21. Delete these paragraphs. The construction work under the UAO is done and O&M is underway. The purpose of this Agreement is simply to address the payment of EPA's legitimate future response costs. There is no need for the parties to revisit the UAO, some of which provisions, in Carrier's view, exceed EPA's authority. If EPA is insistent that the UAO provisions be addressed in this agreement, then Carrier will have to preserve its position that some of the UAO provisions were illegal. That negotiation is unnecessary for us to reach agreement about payment issues for future oversight costs.

Pp. 5-6, ¶¶ 23-28. For the reasons stated above in connection with old paragraph 15, Carrier believes that stipulated penalties are entirely inappropriate in the context of this agreement, which is to assure the government that sums in the range of $10,000 to $35,000 a year are paid to reimburse legitimate oversight costs. Therefore, these provisions, which are concerned with stipulated penalties, should be deleted. Carrier suggests that instead the United States be entitled to an increased interest rate – 10% plus the superfund rate – on undisputed sums which remain unpaid more than 90 days. This language would be added to paragraph 22.

P. 6, ¶ 29. EPA Covenant Not to Sue. In the first sentence, substitute "United States" for "EPA," as actions brought under section 107 are brought by the United States. In addition, the covenant sought from the Settling Party seeks a covenant with respect to all U.S. agencies. The covenants need to be parallel.

The covenant only covers Future Response Costs, which is acceptable as long as these include all future United States costs, and as long as performance of the UAO is not being addressed in this document.

Delete the second sentence, as it is redundant with the reservation of rights, and replace it with the following language: "This covenant not to sue shall become effective on the effective date of this Agreement." If in paragraph 30, EPA reserves the right to sue to recover if the Settling Party does not comply with the Agreement, then this provision is unnecessary, and raises questions about whether the Covenant Not to Sue has any real effect on the United States. In the third sentence, substitute "its obligations" for "their obligations."

P. 6, ¶ 30. Delete subsection b, which purports to reserve to the United States the right to sue for costs that are not within the definition of Future Response Costs. As we will be addressing Past Response Costs separately, what costs are left that should not have been already addressed? If there are categories of costs not covered by this agreement, what use is this

agreement, since its primary attractiveness to Carrier is as a way to avoid litigation and to wrap up these issues once and for all?

P. 7, ¶ 30, subsection e, reserves the United States' rights with respect to Natural Resource Damages. There are charges in the cost package from the Department of the Interior. Has any natural resource damage assessment been done? If these costs are being charged as past response costs by EPA, why is there an exception for natural resource damages? If there has been a natural resource damage assessment done, what natural resource damages are there? Carrier believes that the Department of the Interior looked at this issue and found that there were no natural resource damages. Is that correct? If so, then there is no need to reserve this provision. If there are natural resource damages, the United States should so advise us so that the issue can be addressed.

P. 7, ¶ 32. The covenant not to sue demanded from Carrier is far broader than the government is giving. If all response costs are covered for Carrier, then all response costs should be covered for the United States in its covenant.

The covenant does not appear to be limited to response costs, since the "included but not limited to" language suggests that the final clause "relating to response costs incurred by Settling Party," is not a limitation. This language is unsatisfactory because it might be read as a covenant not to sue the government and its contractors from claims arising under the Federal Tort Claims Act, e.g. from automobile accidents at the Site or other personal injury sorts of claims which are routinely excepted from covenants not to sue in CERCLA matters

We suggest the following substitute language:

> Settling Party agrees not to assert any claims or causes of action against the United States for Future Response Costs incurred by Settling Party for the Collierville Site. This provision shall not impair the right of Settling Party to pursue other claims and causes of action against the United States or its contractors or personnel.

P. 9, ¶ 40. For reasons noted above, Carrier does not believe that there is any need to incorporate the UAO or its appendices into this agreement. Insistence that Carrier do so will require that Carrier's objections to the UAO also be incorporated into the agreement in order to preserve Carrier's rights and defenses against EPA claims concerning the UAO. Please note that the date listed here for the UAO is erroneous. In Carrier's view, the only appendix necessary to be attached to the agreement is the schedule of maximum fiscal year costs EPA may bill.

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Carrier realizes that the changes suggested here are extensive, but believes them to be reasonable given that the proposed form is not well-suited to the factual situation at this site, where construction long ago concluded, and where the anticipated future oversight costs are projected by EPA to be quite small. Additionally, an agreement entered into to avoid future cost recovery litigation should not seek more relief than the government would obtain in a declaratory judgment in such litigation, nor is it reasonable to expect a responsible public company to grant such greater relief.

As you are aware, Carrier declined to agree to a consent decree or a consent order to govern the actual performance of the cleanup, because the terms sought were far more onerous than what could lawfully be ordered, and did nothing to improve the cleanup which Carrier has expeditiously performed. While I am hopeful we can resolve our clients' differences amicably, particularly given the small sums reasonably at issue, the agreement as proposed is unsatisfactory to Carrier for the reasons outlined above.

Please call me after you have had an opportunity to review our proposed changes so that we can discuss these issues and try to resolve this matter.

Sincerely,

Russell V. Randle

Russell V. Randle
Counsel for Carrier Corporation

RVR/rvr

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM M. DAVIS, at al., Defendants and and Third-Party Plaintiffs, v. AMERICAN CYANAMID COMPANY, et al., Third-Party Defendants and Fourth-Party Plaintiffs, v. ALRICH PRECISION MANUFACTURING, et al., Fourth-Party Defendants.	Civil Action No. 90-0484-P

PARTIAL CONSENT DECREE RELATING
TO MULTIPLE PARTIES, PERFORMANCE
OF REMEDIAL WORK AND COST RECOVERY

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607.

b. For purposes of the payments required to be made by Settling Defendants under Subparagraph (a) of this Paragraph only, Future Response Costs shall exclude costs of performing (including O & M) or overseeing the Management of Migration Components of the remedy set forth in the ROD.

c. Oversight Costs recoverable under Subparagraph (a) of this Paragraph shall be limited to the principal sum of $440,000 plus the amount of Oversight Costs incurred in connection with any one or more of the following portions of on-Site Work, as described in the SOW, taking longer than the amount of time indicated below:

Pre-Design	25 days of on-Site Work
Performance Testing	10 days of on-Site Work
Excavation, Treatment, and Backfilling or Off-Site Disposal of Soil	100 days of on-Site Work
Site Restoration	40 days of on-Site Work

For purposes of this Subparagraph, a "day of on-Site Work" shall mean any part of a day during which Work associated with any portion of the above activities, as described in the SOW, is performed at the Site. Reimbursement of Future Response Costs that are not Oversight Costs shall not be limited by this Subparagraph.

d. Settling Defendants may contest payment of any Future Response Costs under this Paragraph if they determine that the United States has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States